1999

Crelley Mackey v. Chris Cannon, individually, The Office of Congressman Chris Cannon, Chris Cannon for Congress, Inc., Cannon Industries, Inc., The CI Group and Cannon Engineering Technologies, Inc. : Reply Brief

Utah Court of Appeals

Roger H. Hoole, Heather E. Morrison; Hoole and King, L.C.; Attorneys for Plaintiff.
Mary Anne Q. Wood; Sheri A. Mower; Wood and Crapo; Attorneys for Defendants.

IN THE UTAH COURT OF APPEALS

CRELLEY MACKEY, Plaintiff/Appellant, vs. CHRIS CANNON, Individually, THE OFFICE OF CONGRESSMAN CHRIS CANNON, CHRIS CANNON FOR CONGRESS, INC., CANNON INDUSTRIES, INC., THE CI GROUP, and CANNON ENGINEERING TECHNOLOGIES, INC., Defendants/Appellees.	CASE NO. 990123-CA ARGUMENT PRIORITY CLASSIFICATION 15

REPLY BRIEF OF THE APPELLANT

Appeal from a Motion to Dismiss Granted
by the Third District Court, Salt Lake Department, State of Utah
Honorable Homer Wilkinson

Mary Anne Q. Wood
Sheri A. Mower
WOOD & CRAPO
60 East South Temple, Suite 500
Salt Lake City, Utah 84111

Attorneys for Appellees

Roger H. Hoole
Heather E. Morrison
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

CRELLEY MACKEY, Plaintiff/Appellant, vs. CHRIS CANNON, Individually, THE OFFICE OF CONGRESSMAN CHRIS CANNON, CHRIS CANNON FOR CONGRESS, INC., CANNON INDUSTRIES, INC., THE CI GROUP, and CANNON ENGINEERING TECHNOLOGIES, INC., Defendants/Appellees.	CASE NO. 990123-CA ARGUMENT PRIORITY CLASSIFICATION 15

REPLY BRIEF OF THE APPELLANT

Appeal from a Motion to Dismiss Granted
by the Third District Court, Salt Lake Department, State of Utah
Honorable Homer Wilkinson

Mary Anne Q. Wood
Sheri A. Mower
WOOD & CRAPO
60 East South Temple, Suite 500
Salt Lake City, Utah 84111

Attorneys for Appellees

Roger H. Hoole
Heather E. Morrison
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. CASES

REPLY ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE CONTRACT CLAIM.

The Brief of the Appellees essentially raises three arguments regarding Ms. Mackey's breach of contract claim. The first argument advanced is that because Mr. Cannon only expressed his "opinions" to the *Salt Lake Tribune*, he did not breach the Settlement Agreement's confidentiality clause. The second argument is that the confidentiality clause is not binding on Mr. Cannon because he spoke only of the alleged sexual harassment which had been the focus of media attention before the Settlement Agreement had been signed. The third argument is that although there had been widespread media attention about the alleged sexual harassment, the trial court sat in "complete ignorance" of the factual and legal allegations of the parties and therefore, could not have found a breach. For the reasons discussed below, none of these arguments justify the trial court's dismissal of Ms. Mackey's breach of contract claim.

A. Mr. Cannon's Disclosures to the *Tribune* Were Not Mere "Opinions".

Mr. Cannon's first argument fails if his statements to the *Tribune* involved factual or legal allegations, regardless of whether, in his view, they were true statements, or simply his opinion. A review of the statements he made demonstrates that they were not mere "opinions", but were unmistakably factual and legal allegations regarding the settled matters. Mr. Cannon stated:

1. That no hostile environment existed in Mr. Cannon's office (R. at 376).

2. That there was nothing to Ms. Mackey's allegations (R. at 376).

3. That Ms. Mackey's allegations had no merit (R. at 376),

4. That her allegations wouldn't have held up (R. at 376).

5. That there was no impropriety on Mr. Cannon's part (R. at 376).

6. That Crelley Mackey has the ability to waive confidentiality (R. at 376).

7. That they are not holding her to confidentiality (R. at 376).

8. That although she is free to discuss it, there would be no benefit for her to talk about it publicly (R. at 376).

The first five comments made by Mr. Cannon clearly involved both factual and legal allegations regarding Ms. Mackey's underlying sexual harassment claim—the claim which the Parties obviously sought to settle. (See the Appellee's Statement of the Case, Brief of the Appellee's, pp. 1-28.) Mr. Cannon's *ex post facto* claim that these allegations were merely his "opinion" does not change their legal and factual nature. Accordingly, these statements were an obvious violation of the Settlement Agreement's confidentiality clause.

Mr. Cannon's last three statements falsely characterize the Parties' obligations not to discuss further the factual and legal disputes settled by them, except under limited circumstances and then only as expressly allowed by the Settlement Agreement. By announcing to the *Tribune* that Ms. Mackey "is free to discuss it" but that it would not be in her interest "to talk about it publicly," Mr. Cannon also mischaracterizes the nature of the Settlement Agreement. That mischaracterization is itself a breach of the Agreement, which prohibited the Parties from discussing the Agreement or its terms. (R. 146-47; 375 at ¶20.)

Thus, Mr. Cannon compounded his breach of the Agreement which prohibited further discussion of the settled claims, and thereby destroyed the benefit of Ms. Mackey's bargain.

Mr. Cannon claims in his Brief that he spoke to the *Tribune* because of intense media pressure.[1] (See, *inter alia*, Brief of Appellee at p. 27.) If this were the case, then Mr. Cannon's comments were nevertheless limited to the remaining provision of the confidentiality clause which provides that:

> (e) **thereafter, if further pressured by the media and asked specifically whether the Cannon Entities or individuals contributed money to the settlement,** Mr. Cannon or his representatives may respond (after having spoken with Roger H. Hoole) that "no Cannon entities or campaign contributed to any settlement." **Other than as specifically allowed herein,** the Parties and their attorneys shall not volunteer any confidential information, and **in response to any request for information by any person or entity shall say only "no comment."**

(R. at 146-47; and 375; Addendum "B" at ¶10) (emphasis added). The restrictions in the confidentiality clause had previously been recognized by Steve Taggart, Mr. Cannon's chief of staff and spokesperson, who told the *Deseret News* on February 11, 1998, that beyond confirming that Mr. Cannon and his entities did not pay any money, the "terms of the settlement did not allow him to offer any further details." (R. at 363). The *Deseret News* reported that Mr. Taggart's "other comments were limited to one sentence released jointly by Cannon and Mackey's attorney." (R. at 363). Thus, Mr. Cannon's attempt to blur the

---

[1] The intensity of any media pressure is really not at issue here. It was essentially up to Mr. Cannon to determine whether or not he felt sufficient pressure to gradually release the specific language to which the Parties had agreed. All of the media pressure in the world would not have excused Mr. Cannon, or any of the other Parties to the Agreement, from complying with it. The fact that Mr. Cannon is a member of the House of Representatives and, for his own political purposes, wanted to avoid scrutiny as a member of the Judiciary Committee, does not justify his breach.

distinction between opinion and allegation is in notable conflict with Mr. Taggart's acknowledgment of the purposes, prohibitions and parameters of the Settlement Agreement's confidentiality clause.

If the trial court is upheld, a clear message will be sent to settling litigants that a confidentiality agreement preventing further discussion of settled disputes is unenforceable so long as the breaching party later characterizes what he said as his "opinion". This result is untenable and would severely constrain litigants from settling controversies, especially in employment cases where confidentiality clauses are often a critical part of the settlement. Mr. Cannon asks this Court to relieve parties, such as himself, who voluntarily enter into confidential settlements, from their obligation not to thereafter discuss or publicize mooted allegations. This Court should decline Mr. Cannon's invitation.

B. Mr. Cannon Breached his Agreement Not to Further Discuss the Matters Settled by the Parties.

Mr. Cannon's second argument is that he did not breach the Agreement because after the settlement, he made statements about alleged sexual harassment which had already been reported in the media. In essence, the argument is that one can not make confidential that which everyone already knows. But this argument misses the point and makes no sense here because, as plainly evidenced by the confidentiality clause, each of the Parties to the Settlement Agreement intended and agreed that they, and each other, would not **further** discuss their settled disputes. Preventing **future** discussion of all mooted matters was critical to the Parties, including Mr. Cannon, when they entered into the Agreement precisely because of the press coverage which had occurred.

Thus, the Parties, including Mr. Cannon, agreed to severely limit further press coverage by stipulating that only certain sentences would ever be said in the future. Beyond that, it was expressly agreed that "**the Parties** and their attorneys **shall not volunteer** any confidential information, **and in response to any request for information by any person or entity shall say only "no comment."** (R. at 146-47; and 375; Addendum "B" at ¶10) (emphasis added).

While it is not doubted that months after the settlement Mr. Cannon felt political pressure to denounce the factual and legal basis of Ms. Mackey's claims, he nonetheless remained under a strict obligation to comply with the terms of the Settlement Agreement. He simply was not at liberty to say what he said. Political expediency does not eliminate legal responsibility.

Furthermore, Mr. Cannon's statements to the *Tribune's* reporters in April of 1998 were different in both nature and content from those he made to the press more than eight months earlier. As set forth in detail in the Appellees' Brief, between June 29 and July 31, 1997, articles appeared in local newspapers quoting vague, uncertain and inconsistent comments by those reportedly involved in possible sexual harassment in Mr. Cannon's Provo field office. (See Brief of the Appellees, pp.11-6). Mr. Cannon responded publicly by confirming that he had "enlisted a former FBI agent to investigate", that he had "offer[ed] to pay $5,000 to Ms. Mackey for counseling and other expenses" and that "we will never allow sexual harassment to infect the workplace". (R. 348-50, 366). Those vague comments and Mr. Cannon's responses—all of which were repeated in local

newspapers—sparked interest for a time, but after July, the Parties stopped talking to the press and the media's reporting was essentially over.[2]

In marked contrast, when Mr. Cannon volunteered information to the Tribune on April 15, 1998, he diverted from his previous conciliatory posture and directly attacked Ms. Mackey's then settled claims as essentially so frivolous and without merit that "there would be no benefit for her to talk about it publically." Thus, Ms. Mackey was given the terrible choice of breaching the Settlement Agreement by speaking out in defense of herself, and thereby risk being sued herself, or of honoring the Parties' Agreement with her painful silence. She chose the latter, and then, appropriately sought redress through the courts for Mr. Cannon's breach.

If the trial court's dismissal of her breach of contract claim is not reversed, justice will be lost for Ms. Mackey. And perhaps countless others attempting to resolve controversies through confidential settlement agreements in the future may hesitate as they realize that any confidential agreement may not actually be confidential if their disputes have previously received press coverage. Such a result would negatively impact settlement negotiations and disrupt settlement agreements and would clearly be contrary to the public policy favoring the settlement of private disputes. Therefore, this Court should reject Mr. Cannon's claim that he had no obligation to refrain from discussing the mooted allegations further because they had previously received some media attention.

---

[2] The only other article appearing between July of 1997 and February 9, 1998, which was the date the Settlement Agreement was signed, was in the *Tribune* on January 20, 1998 and related to Ms. Mackey going on paid administrative leave. (R. at 355 and 364).

C. The Trial Court Was Generally Aware Of The Nature Of The Settlement.

The third argument which Mr. Cannon makes, notwithstanding his extensive reliance on the reports of alleged sexual harassment in the pre-settlement newspaper articles, is that the "district court sat in complete ignorance" of the factual and legal allegations of the parties and therefore, could not have found a breach. (Brief of the Appellees pp. 9, 30 and 42). To address this diversionary argument, Ms. Mackey made a motion to the trial court to supplement the record through an *in camera* inspection of the Settlement Agreement. This motion was opposed by Mr. Cannon. The trial court denied the motion—apparently satisfied that it was aware of at least the general nature of the pertinent factual and legal claims which had been settled by the parties.[3]

In anticipation that Mr. Cannon would raise the same "complete ignorance" argument before this Court, Ms. Mackey also appealed the trial court's denial of her motion to supplement the record. (R. at 555-7). It is submitted, however, that a remand on that issue should not be necessary because Mr. Cannon's reliance on the newspaper articles published before the settlement adequately suggests the background for the settlement. Thus, the claim that "[n]obody had a clue what the legal theories or facts were" is disingenuous. (Brief of Appellees, p. 9). For purposes of this case it can fairly be assumed that all legal and factual allegations, including any specific legal and factual allegations, were settled.

---

[3] It should be noted that the trial court did not grant Mr. Cannon's Motion to Dismiss on the grounds that it was unable to determine whether the factual and legal claims settled by the Parties included allegations of sexual harassment. Rather, the trial court's Order On Defendants' Motion To Dismiss Amended Complaint And Plaintiff's Motion To Supplement The Record necessarily assumes that sexual harassment claims were among those settled. (R. at 509-11).

II. THE TRIAL COURT ERRED IN DISMISSING THE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM.

Despite Mr. Cannon's acknowledgment that Ms. Mackey's sexual harassment claims were settled[4] and his admission that he expressed his "opinions" regarding those claims,[5] he boldly argues that Ms. Mackey is asking this "Court, in essence, to rewrite the Settlement Agreement to prohibit the expression of **opinions that have nothing whatsoever to do with the underlying factual and legal allegations of the action that was settled.**" (Brief of Appellee, p. 39) (emphasis added). This is a misstatement on several levels.

However, before addressing why Ms. Mackey's implied covenant claim does not offend the well-settled principle that the implied covenant does not create new and independent rights, she must first reply to the statement quoted below in footnote 4. Ms. Mackey is not "angry" that Mr. Cannon and his entities did not participate financially in the settlement, nor is she at all angry about the **terms** of the settlement. She is, however, understandably upset about the **breach** of the settlement which utterly destroyed much of the benefit of her bargain under the settlement. In short, contrary to Mr. Cannon's assertions, the purpose of this case is not to obtain what Ms. Mackey never had; it is to recover for the loss of what was already hers.

---

[4] For example, at page 28 of the Brief of Appellee, it states: "Ms. Mackey is angry because Congressman Cannon truthfully informed the *Tribune* that neither he nor any of his associated entities paid her a nickel to settle her **sexual harassment claims**." (emphasis added).

[5] See, generally, the Brief of the Appellee, pp. 33-34, in which Mr. Cannon argues in part that the statements he made to the *Tribune* were only expressions of his opinion regarding the merits of Ms. Mackey's hostile work environment claims.

Ms. Mackey has never attempted to use the implied covenant of good faith and fair dealing to assert new and independent rights which were not agreed upon by the Parties. However, Mr. Cannon's conduct on April 15, 1998 and his narrow interpretation of the language and purpose of the Settlement Agreement both frustrate the bargained-for-agreement of the Parties and highlight the appropriateness of Ms. Mackey's claim that he breached the implied covenant of good faith and fair dealing.[6]

Ms. Mackey submits that the Parties expressly agreed to abide by the terms of the Settlement Agreement and that Mr. Cannon's breach of those express terms gave rise to her breach of contract claim. She further submits that "[u]nder the covenant of good faith and fair dealing, each party [including Mr. Cannon] impliedly promise[d] that he [would] not intentionally or purposely do anything which [would] destroy or injure [Ms. Mackey's] right to receive the fruits of the contract." Brown v. Moore, 973 P.2d 950, 954 (Utah 1998), citing St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991). Therefore, by sharing his one-sided factual and legal "opinions" with the *Tribune* (and further by suggesting that she would not even care or dare to respond), Mr. Cannon has breached not

---

[6] Mr. Cannon's argument against the application of the implied covenant would destroy it completely. For example, he argues at page 41 of Appellee's Brief, that if "the Court found that Cannon's interpretation of the Settlement Agreement was unreasonable, Mackey would prevail on her breach of contract claims, and the implied covenant could do nothing but create new rights not granted by the contract." He then argues that "if Cannon's interpretation of the Settlement Agreement is correct, then any alteration of that interpretation under the implied covenant could only be creating rights not granted by the contract itself, which is prohibited under Utah law." (Brief of Appellee, p. 41). This argument leaves no room for the implied covenant to operate within the parameters of the Settlement Agreement.

only the express terms of the Settlement Agreement, he has also breached the implied covenant of good faith and fair dealing. Mr. Cannon destroyed Ms. Mackey's right to receive much of the benefit of her bargain. "Good faith performance [or] enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc., 889 P.2d 445, 451 (Utah. App. 1994). The trial court misunderstood this.

Furthermore, the issue of whether Mr. Cannon breached the implied covenant is not limited to the express terms of the Settlement Agreement itself. Courts may also consider the course of dealings between the Parties. Brown, 973 P.2d at 954; St. Benedict's, 811 P.2d at 200. In so doing, this Court should note the silence of the Parties for several months before the Settlement Agreement was signed on February 9, 1998; the pains to which the Parties went to limit what and how statements could be made after it was signed; Mr. Cannon's then chief of staff Steve Taggart's acknowledgment of the purposes, prohibitions and parameters of the Settlement Agreement's confidentiality clause; and all of the Parties' compliance with the Settlement Agreement before and after Mr. Cannon went to the *Tribune* on April 15, 1998. Thus, with the exception of Mr. Cannon's improper statements on April 15, 1998, the course of the Parties' dealings further evidence their implied covenant to act in good faith and to deal with each other fairly by not discussing further the settled matters.

Mr. Cannon's position, that he could say whatever he wanted to so long as he later characterized it as his "opinion", or so long as it had already been in the press, violated Ms.

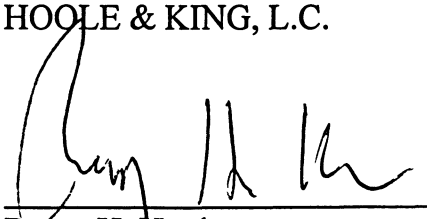
Mackey's justifiable expectation that he would not further discuss the legal and factual allegations which they had voluntarily compromised and settled. His interpretation of the purpose of the Settlement Agreement's confidentiality clause is fundamentally unreasonable. If Mr. Cannon had wanted to be able to express his "opinions", he should have successfully bargained for an exception to that effect in the Settlement Agreement. He did not do so. In arguing that he is now free to express his factual and legal "opinions" about the matters settled, without violating either the express terms of the contract or the implied covenant, Mr. Cannon asks this Court to create a better contract for him than he created for himself, something this Court cannot do. Brown, 973 P.2d at 954. Thus, the trial court's dismissal of the implied covenant claim must be reversed.

CONCLUSION

Mr. Cannon agreed not to further discuss the legal and factual allegations which the Parties had settled. He did not honor his agreement and therefore, he has breached both the express terms of the contract and the implied terms of the covenant. For these reasons, the trial court's ruling granting Mr. Cannon's motion to dismiss Ms. Mackey's contract claims should be reversed, and this case should be remanded.

RESPECTFULLY SUBMITTED this 4th day of October, 1999.

HOOLE & KING, L.C.



Roger H. Hoole
Heather E. Morrison
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 1999, I caused 2 true and correct copies of the foregoing to be placed in the United States District mail, first class postage prepaid, addressed to the following:

Mary Anne Q. Wood
Sheri A. Mower
WOOD & CRAPO
60 East South Temple, Suite 500
Salt Lake City, Utah 84111